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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 384

PEOPLE OF THE STATE OF NEW YORK, EX REL. ROSE HALVEY, PETITIONER,

vs.

JOHN F. HALVEY, CUSTODIAN OF JOHN ARTHUR HALVEY

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI FILED AUGUST 10, 1946.

CERTIORARI GRANTED OCTOBER 14, 1946.

SUPREME COURT OF THE UNITED STATES

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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[fol. 1]

IN SUPREME COURT OF NEW YORK

Appellate Division—First Judicial Department

In the Matter of the Application of Rose Halvey, Relator-Appellant, for a Writ of Habeas Corpus to obtain the custody of John Arthur Halvey, now held by John F. Halvey, Defendant-Respondent.

Statement Under Rule 234

This is an appeal by Rose Halvey, the relator, from an order of the Supreme Court of the County of New York, dated June 18, 1945, and filed in the office of the Clerk of the County of New York on June 19, 1945, and involves the custody of John Arthur Halvey, the seven year old son of the said Rose Halvey and the defendant John F. Halvey. The order appealed from was made in the above entitled proceeding. The decision was rendered by the Honorable Felix C. Benvenga, one of the Justices of the Supreme Court of the State of New York.

This proceeding was commenced by the filing on or about May 1, 1945, of a petition by the said Rose Halvey for a writ of habeas corpus directed to the defendant-respondent, John F. Halvey, for the purpose of inquiring into the cause of the imprisonment and restraint of the said John Arthur Halvey, and of delivering him therefrom.

[fol. 2] On May 2, 1945 a writ of habeas corpus, returnable the 4th day of May, 1945, was allowed by the Honorable Justice Felix C. Benvenga.

A return to the said writ of habeas corpus, verified by the said John F. Halvey, on the 3rd day of May, 1945, was thereafter filed.

The said Rose Halvey appeared in the proceeding herein by her attorneys, Rosenberg & Rosenberg, and the said John F. Halvey appeared in the proceeding by his attorney, Isidore Cohen, Esq.

There are no other parties to this proceeding. There has been no change in the parties nor in their respective attorneys except that, pursuant to a stipulation filed in the office of the Clerk of the County of New York on or about July 2, 1945, the firm of Mitchell, Capron, Marsh, Angulo & Cooney, has been substituted as attorneys for the Relator-

Appellant, in the place and stead of the said firm of Rosenberg & Rosenberg.

The issues raised by the return to the writ were tried before Honorable Justice Filix C. Benvenga of the Supreme Court, at a Special Term, Part II of the Supreme Court of the State of New York on May 4, 1945. The Justice rendered and filed a written opinion on or about the 31st day of May, 1945 (*Halvey* vs. *Halvey*, 185 Misc. 52). Thereafter the order appealed from was made and entered in the proceeding on or about June 18, 1945. Notice of appeal from the said order was served on Isidore Cohen, Esq., attorney for the defendant-respondent, on July 9, 1945, and filed with the Clerk of the County of New York on July 10, 1945.

[fol. 3] SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[Title omitted]

NOTICE OF APPEAL—July 6, 1945

Sirs:

PLEASE TAKE NOTICE that the relator Rose Halvey herein appeals to the Appellate Division of the Supreme Court for the First Judicial Department from each and every part of the order of this Court dated June 18th, 1945, and entered on June 19th, 1945, in the office of the Clerk of the County of New York except in so far as the order aforesaid ordered, adjudged and decreed that the custody of the infant child John Arthur Halvey remain with the mother Rose Halvey.

Dated, New York, N. Y., July 6th, 1945.

Yours, etc., Mitchell, Capron, Marsh, Angulo & Cooney, Attorney for Relator, Rose Halvey, 20 Exchange Place, Borough of Manhattan, New York City.

[fol. 4] To Isidore Cohen, Esq., Attorney for Respondent, 150 Broadway, Borough of Manhattan, City of New York.
Clerk of the County of New York.

SUPREME COURT OF NEW YORK

[Title omitted]

ORDER APPEALED FROM—June 18, 1945

A petition having been duly made by the above named ROSE HALVEY, for a Writ of Habeas Corpus, such petition [fol. 5] being duly verified on the 1st day of May, 1945, and a writ having been thereupon duly allowed in the above matter by the Hon. FELIX C. BENVENGA, a Justice of the Supreme Court, and the said Writ having been duly issued by the Clerk of the Court, under its seal, on the 2nd day of May, 1945, and the defendant, John F. Halvey, having been duly commanded by such writ to have the body of the child, John Arthur Halvey, before a Special Term, Part II of the Supreme Court, held at the County Court House, in the Borough of Manhattan, City of New York, on the 4th day of May, 1945, and the defendant, John F. Halvey, having duly appeared and made written return to the said writ, in which he denied certain material allegations of the petition, such return being dated the 3rd day of May, 1945, and the issues thereon having duly come on for hearing at the above captioned time and place, and the body of John Arthur Halvey, having also been produced into court at said time and place, and Messrs. Rosenberg & Rosenberg, having appeared as attorneys for the petitioner, by Irwin H. Rosenberg, of Counsel, and Isidore Cohen, Esq., having appeared as attorney for the defendant, and after hearing the allegations and proofs of the parties, and the Court having interviewed the infant, John Arthur Halvey, in private, and due deliberation having been had, and the Court having made and filed its opinion in writing, it is

ORDERED, ADJUDGED AND DECREED, as follows:

(1) That the custody of the infant child, John Arthur Halvey, remain with the mother, Rose Halvey.

(2) That the father, John F. Halvey, have certain rights of visitation, as follows:

[fol. 6] (a) During each summer vacation period after the year 1945, the said child shall be with the father, commencing on June 23rd, and ending on September 7th of each year and shall live with him during such period in his home in New York.

(b) During the entire Christmas vacation period the said child will be with the father and live with him in his home in New York.

(c) At any time, while the said child lives with the mother, the father shall have the right to visit and have the child with him each afternoon from 2 o'clock until 5 o'clock.

(3) At any of the preceding times when the said child lives with the father in New York, the mother, if then in New York, shall have the right to visit and have the child with her each afternoon from 2 o'clock until 5 o'clock.

(4) At the commencement of each of the aforesaid vacation periods during which the said child is to be with the father, the latter shall go to Florida to get the said child, and the mother shall deliver or make available the said child to the father, at her home in Florida, and the father shall accompany him to New York. At the end of each of said vacation periods, the father, or some other suitable person whom he shall delegate, shall accompany the said child on his return trip to Florida, and shall deliver him to the mother's residence in that State.

(5) That while the child is with the father or with the mother, he shall be provided with a home and there given proper care and attention.

[fol. 7] (6) The child shall remain with the father in New York until July 16th, 1945, when the father shall return him to the mother in Florida, provided that the Surety Company Bond, hereinafter set forth shall have been filed by the mother.

(7) The petitioner, Rose Halvey, is hereby directed to file in the Office of the Clerk of this Court, a Surety Company Bond in the sum of $5,000.00 in form to be approved by the Court, conditioned for the faithful performance of the terms and conditions of this order, and for the delivery of said child by the said petitioner at her home in Florida to the father for removal to this State whenever, under the terms hereof, the father shall have the right to have the said child with him, which bond shall remain in full force and effect so long as this order is in effect; and unless and until the said petitioner, Rose Halvey, files such bond, the petitioner, Rose Halway, shall not be permitted to re-

move said child from the State of New York, and the said child, shall, except during the periods of visitation hereinabove granted to the father, John F. Halvey, remain with the mother, Rose Halvey, in the State of New York.

(8) In the event that the petitioner, Rose Halvey, shall appeal from any portion of this order or from an order of the Appellate Division affirming or modifying this order, then pending the hearing and final determination of any such appeal or appeals, the provision hereinabove set forth requiring the petitioner to give a Surety Company Bond for the faithful performance of the terms and conditions of this order, is suspended upon condition that the petitioner furnish a Surety Company Bond in the sum of $5,000.00 conditioned for the faithful performance of all of the terms and conditions of this order, except the post-
[fol. 8] ing of the bond required in paragraph "(7)", pending such appeal or appeals, with such Surety Company Bond to be cancelled upon the delivery of the said child to the father, John F. Halvey in the event of the final affirmance of the provisions of this order requiring the giving of the Surety Company Bond first mentioned, or in the event of the reversal of this Order or of the provisions of this order requiring the giving of the Surety Company Bond first mentioned.

Enter, F. C. B., *J. S. C.*

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

In the matter of the application of ROSE HALVEY, Relator, for a Writ of Habeas Corpus to obtain the custody of John Arthur Halvey, now held by John F. Halvey, Defendant

PETITION FOR WRIT OF HABEAS CORPUS—May 1, 1945

To the Supreme Court of the State of New York:

The petition of ROSE HALVEY respectfully shows to this Court and alleges:

[fol. 9] 1. Your petitioner is a resident of 3590 Crystal View Court, Miami, Florida, where she and the infant child

whose custody is here involved, have resided continuously since April 13th, 1944.

2. The defendant John F. Halvey resides at 303 West 19th Street, and maintains an office for the transaction of business at 2 West 13th Street, both in the Borough of Manhattan, City of New York.

3. That on the 10th day of April, 1937, your petitioner and the defendant were married and they thereafter resided at 303 West 19th Street, in the Borough of Manhattan. John Arthur Halvey, the issue of such marriage, was born on the 4th day of February, 1938, and is now seven years of age.

4. That heretofore and on the 12th day of April, 1944, due to the beatings and other cruel and abusive treatment, which your petitioner had received from the defendant for a number of years, your petitioner separated from the defendant, taking with her her child John Arthur Halvey.

5. Your petitioner and her son John Arthur Halvey, have been residing at the home of your petitioner's sister and brother-in-law, Mr. and Mrs. John J. Hagerty, at 3590 Crystal View Court, Miami, Florida, ever since April 13th, 1944, and your petitioner intends to continue to reside there and to make it her permanent home.

6. By reason of the beatings and other cruel and inhuman treatment which your petitioner received from [fol. 10] the defendant, she duly instituted an action in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, against the defendant, in which action she sought a final decree of divorce and the custody of her child John Arthur Halvey. This action was instituted by the filing of a bill of complaint and the issuance on the 22nd day of February, 1945, of an order directing the service of process upon the defendant by publication; service was thereafter effected on the defendant in accordance with the Laws of the State of Florida. Prior to the institution of the said action, the defendant was advised that your petitioner was going to institute such an action and subsequent to its institution, the defendant received notice thereof and your petitioner has been informed and verily believes that the defendant in fact consulted Florida counsel with reference to such action.

7. Your petitioner further alleges that the defendant having failed to answer or appear in the action instituted by your petitioner in the State of Florida aforementioned, a hearing took place before a Special Master on the 16th day of April, 1945, and a report was made by him dated the 18th day of April, 1945, wherein he recommended that a decree be entered granting a divorce to your petitioner and awarding the custody of the child to your petitioner. Upon this report, a decree was duly entered by the Court on the 20th day of April, 1945, in which decree your petitioner was granted a divorce from the defendant and which further provided that

> "It is further ordered adjudged and decreed that the [fol. 11] permanent care, custody and control of the minor child of the marriage, to-wit, John A. Halvey, be and the same is hereby awarded to the plaintiff, Rose Halvey."

8. Your petitioner further alleges that despite the proceedings before the Florida Court hereinabove referred to, the defendant took possession of the child on April 19th, 1945, while he was attending Gulliver's School in Miami, Florida, and without in anywise communicating with your petitioner, and in complete disregard of your petitioner's rights, took the child with him to his home at 303 West 19th Street, in the Borough of Manhattan. Your petitioner thereafter communicated with the defendant and was informed by him that although he had the child at his home, he would not give up the custody of the child, nor would he permit your petitioner to visit the child, despite the decree of the Florida Court awarding the custody of the child to your petitioner.

9. That it is for the best interests of the child that he be continued in the custody of your petitioner. As before stated, your petitioner and her child reside at the home of Mr. and Mrs. John J. Hagerty at 3509 Crystal View Court, Miami, Florida. The home is a large palatial establishment, consisting of ten rooms and three baths on a plot approximately 100 ft. front and rear by 300 ft. deep, fronting on Biscayne Bay. Your petitioner has two rooms and bath for her own use. The child was enrolled at a private school known as "Gulliver's School", with the tuition paid by your petitioner. Your petitioner is a registered nurse and feels fully competent to care for the child.

[fol. 12] 10. That the said child is being kept away from your petitioner by his father wrongfully, forcibly and against the will of the said infant and that the cause of the imprisonment and restraint of the child, is the desire of the defendant to alienate the child's affections from your petitioner.

11. That the said child John Arthur Halvey, has not been committed, nor is he detained by virtue of a mandate issued by a Court or Judge of the United States, nor by virtue of a final judgment or decree of a competent tribunal of civil or criminal jurisdiction, nor by the final order of such tribunal made in a special proceeding, nor by virtue of an execution or other process issued upon such a judgment, decree or final order.

12. That your petitioner accordingly prays for the issuance of a writ of habeas corpus, for which writ no previous application has been made.

Wherefore, your petitioner respectfully prays that a writ of habeas corpus directed to the defendant John F. Halvey issue for the purpose of inquiring into the cause of the imprisonment and restraint of said John Arthur Halvey and of delivering him therefrom pursuant to the statute in such case made and provided.

Dated: New York, May 1, 1945.

Rose Halvey, Petitioner.

[fol. 13] *Duly sworn to by Rose Halvey. Jurat omitted in printing.*

[fol. 14] IN THE SUPREME COURT OF NEW YORK

WRIT OF HABEAS CORPUS—May 2, 1945

THE PEOPLE OF THE STATE OF NEW YORK

To John F. Halvey, Defendant:

We Command You that you have the body of John Arthur Halvey by you imprisoned and detained as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said John Arthur Halvey is called or charged before the Supreme Court of the State of New York, at a Special Term, Part II thereof, appointed

to be held in and for the County of New York, at the Courthouse, Pearl and Center Streets, in the Borough of Manhattan, City of New York, on the 4th day of May, 1945, at 2:00 o'clock in the afternoon of the said day, to do and receive what shall then and there be considered concerning him and have you then and there this writ.

Witness, Hon. Felix C. Benvenga, one of the Justices of this Court, this 2nd day of May, 1945.

Archibald R. Watson, Clerk.

Rosenberg & Rosenberg, Attorneys for Relator, Office and P. O. Address, 295 Madison Avenue, Borough of Manhattan, City of New York.

The foregoing writ is allowed this 2nd day of May, 1945.
Felix C. Benvenga, Justice of the Supreme Court of the State of New York.

[fol.15] SUPREME COURT, NEW YORK COUNTY

In the Matter of the Application of ROSE HALVEY, Relator, for a Writ of Habeas Corpus to obtain the custody of John Arthur Halvey, now held by John F. Halvey, Defendant

RETURN TO WRIT OF HABEAS CORPUS

John F. Halvey, the defendant in this proceeding and the father of the above named child, for his return to the petition and writ of habeas corpus herein, produces the above named child, John Arthur Halvey, into court, and respectfully:

1. Denies each and every allegation contained and alleged in paragraphs "4", "9" and "10" of the petition herein.

2. Denies that he has any knowledge or information sufficient to form a belief as to the allegations contained and alleged in paragraphs "6", and "7" of the petition.

3. Admits that he took possession of the child on April 19th, 1945, and took him to his home in the Borough of Manhattan, City of New York, and that he refused to give up custody of the child, but denies each and every other allegation contained and alleged in paragraph "8" of the petition herein.

[fol. 16] For a Separate Defense Herein and as a Complete Answer to the Writ and Petition Herein, Defendant Alleges:

4. That on the face of the petition the court has no jurisdiction of this proceeding by reason of the fact that the petitioner herein is not an inhabitant of this State.

For a Further Separate Defense Herein and as a Complete Answer to the Writ and Petition Herein, Defendant Alleges:

5. That the petitioner herein did on or about the 12th day of April, 1944, leave this defendant and his home without cause or justification, and without the consent of the defendant, and that she abandoned this defendant and continues to live apart from him, and did on said date take with her the said infant child without disclosing the whereabouts of said child to this defendant, and did remove him from the State of New York; that the said child is now in the custody of this defendant, the father of said child, who is well able to support and care for him.

For a Further Separate Defense Herein and as a Complete Answer to the Writ and Petition Herein, Defendant Alleges:

6. That the petitioner herein is not a fit or suitable person to have custody of the said child, John Arthur Halvey.

Wherefore, defendant demands that these proceedings be dismissed with costs.

(Signed) John F. Halvey, Defendant.

[fol. 17] SUPREME COURT, NEW YORK COUNTY, SPECIAL TERM, PART II

In the Matter of the Application of Rose Halvey, Relator, for a Writ of Habeas Corpus to Obtain the Custody of John Arthur Halvey, now held by John F. Halvey, Respondent

New York, New York, May 4th, 1945.

Statement of Evidence

Before: Honorable Felix C. Benvenga, Justice

APPEARANCES:

Rosenberg & Rosenberg, Esqs., Attorneys for Relator.
Irwin H. Rosenberg, Esq., of Counsel.
Isidore Cohen, Esq., Attorney for Respondent.

MOTION TO DISMISS

Mr. Cohen: I have a preliminary motion I would like to make.

[fol. 18] The Court: Go ahead.

Mr. Cohen: I move to dismiss these proceedings on the ground that the Court has no jurisdiction of the proceedings under Section 70 of the Domestic Relations Law, which provides that such proceedings lie in favor of an inhabitant of the State.

Under the petition, the relator states, in Paragraph First "Your petitioner is a resident of 3590 Crystal View Court, Miami, Florida, where she and the infant child, whose custody is involved, have resided continuously since April 13th, 1944."

She also says, in Paragraph Fifth, that "She has been living at the home of her sister and brother-in-law ever since April 13th, 1944, and your petitioner intends to continue to reside there and to make it her permanent home."

As I understand the plain reading of that section, its purpose is to give relief to inhabitants of the State of New York, not to persons who come into this State from another State with the intention of removing the child to that other State.

The Court: Have there been any cases on the subject? Offhand, it seems a very narrow view to me. However, the section does contain the word "inhabitant".

I will take the motion under advisement, as I will take any other motions here under advisement.

Mr. Cohen: Very well.

Mr. Rosenberg: Shall I proceed, your Honor?

The Court: Yes.

Mr. Rosenberg: Do you wish the witness sworn?

The Court: Yes.

[fol. 19] Rose Halvey, residing at 3590 Crystal View Court, Miami, Florida, the relator, called as a witness, being duly sworn, testified as follows:

Direct examination.

By Mr. Rosenberg:

Q. Mrs. Halvey, you were, were you not, the wife of John F. Halvey?

A. Yes.

Q. And by John F. Halvey, you mean the gentelman seated at the table over here?

A. Yes.

Q. When did you marry him?

A April 10th, 1937.

Q. Where was this marriage contracted?

A. Hastings-On-The-Hudson.

Q. Subsequent to the marriage, where did you live?

A. At 303 West 19th Street.

Q. In what city is that?

A. New York City.

Q. Were there any children born of the marriage?

A. Yes, sir.

Q. How many?

A. One.

Q. A boy or a girl?

A. A boy.

Q. When was he born?

A. February 4th, 1938.

Q. What is his name?

A. John Arthur Halvey.

Q. Subsequent to the birth of the child, did you live with your husband?

A. Yes, sir.

Q. Until when?

A. Until April 12th, 1944.
Q. Will you tell us the reason you left him?
A. Well, he was abusing me.

The Court: What is that?
The Witness: He was abusing me.

Q. When you say "He was abusing me", what do you mean by that?
A. He hit me.
Q. Did he hit you on a single occasion?
A. No; he hit me on numerous occasions.

The Court: What do you mean by "numerous"? How many times?
[fol. 20] The Witness: Fifteen times.
The Court: What is that?
The Witness: Fifteen or more times.
The Court: Fifteen or more times in the course of what period of time?
The Witness: About seven years.
The Court: Seven years?
The Witness: Yes.
The Court: Go ahead.

Q When you say he hit you, do you mean it was a slight slap?
A. No.
Q. Suppose you tell us—describe, if you will, the method in which he hit you?
A. He hit me with his fist, blackening my eyes. I had bruises on my body.
Q. In addition to striking you, was there any other method of abuse adopted by Mr. Halvey?
A. He kicked me.
Q. Did he ever use any obscene language in your presence?
A. Yes, sir.
Q. Was such language used in the presence of the child?
A. Yes, sir.
Q. This course of abuse continued over the period of six or seven years that you have referred to?
A. Yes, sir.
Q. When did that begin, shortly after the child was born?
A. Yes; before, too.

Q. Well, now, had there been any dispute at or about the time you left Mr. Halvey in April of last year?

A. Well——

The Court: What caused you to leave in April, 1944?

The Witness: Because I could not stand it any longer. I was a nervous wreck mentally and physically.

[fol. 21] The Court: What happened just before the date that you left? Had something happened just before you left him?

The Witness; No; it was a continual——

Q. A continual what? Had he struck you?

A. Yes; and he would not talk to me for a couple of weeks at a time.

Q. Did you leave a note when you left him?

A. I did.

Q. What did you tell him?

A. I told him that I couldn't stand it any longer and I had to leave the way I did because if I had told him he would have abused me more, and I told him that my address from then on would be 3950 Crystal View Court, Miami, Florida.

Q. Did you go to Miami immediately after leaving him?

A. Yes.

Q. With whom did you reside at the address you just mentioned in Miami?

A. With my sister and brother-in-law.

Q. When did you arrive in Miami?

A. April 13th, 1944.

Q. You took your son with you?

A. I did.

Q. Have you resided there continuously ever since April 13th, 1944?

A. I have.

Q. Is it your intention to continue to reside in Florida?

A. Yes.

Q. Is it your intention to make Florida your permanent home?

A. Yes.

Q. Until coming back this week, you have never been back to New York, have you?

A. No.

Q. What is the name of your brother-in-law and sister, with whom you reside?

A. Mr. and Mrs. John J. Hagerty.

[fol. 22] Q. Did you in February of this year cause an action to be instituted in Dade County, Florida, for a divorce?

A. I did.

Q. Do you recall the date?

A. What is that?

Q. Do you recall the date upon which this action was started?

Mr. Cohen: I object to all testimony in relation to the proceedings in Florida upon the ground that they are incompetent, irrelevant and immaterial.

The Court: I will take it, subject to a motion to strike it out.

Go ahead, you may answer.

The Witness: It was in February that I went—is that what you said?

Q. Do you recall when in February of this year the action was begun?

A. Was it the 20th?

The Court: February of this year?

Mr. Rosenberg: Yes, your Honor.

The Witness: Yes.

Q. Will it refresh your recollection if I tell you it was on February 22nd?

A. 22nd, yes.

The Court: Have you copies of the decree?

Mr. Rosenberg: I have the decree, your Honor.

The Court: All right, go ahead.

Mr. Rosenberg: It will be conceded, will it not, that there was service by publication, Mr. Cohen, in that divorce proceeding?

Mr. Cohen: No.

The Court: Go ahead, prove your case.

[fol. 23] Q. Did you in this divorce proceeding in Florida attend a hearing on April 16th, 1945 before a Special Master?

A. Yes, sir.

Q. And the question taken up at that proceeding was the custody of the child, was it not?

A. Yes, sir.

Q. Several days subsequent to that, a divorce decree was granted to you, is that correct?

A. Yes.

Mr. Rosenberg: I offer in evidence an exemplified copy of the Florida divorce decree.

Mr. Cohen: Objected to.

The Court: I will take it, subject to a motion to strike it out.

(Received in evidence and marked Relator's Exhibit 1.)

Q. On April 19th, 1945 did you take your son to school?

A. I did.

Q. At about what time?

A. Nine o'clock in the morning.

The Court: What date was that?

Mr. Rosenberg: April 19th.

Mr. Cohen: I don't think the son has been mentioned until this time, except his birth.

The Court: It is mentioned here in the decree.

Mr. Cohen: I mean, she did not say——

The Court: I assume she took the boy.

Q. So that there may be no misunderstanding, Mrs. Halvey, when you went to Florida last April, did you take your son with you?

A. Yes, sir.

Q. I believe you testified before that you enrolled him in September of 1944 in school; is that correct?

A. Yes, sir.

[fol. 24] Q. That was in Miami?

A. Yes, sir.

Q. After you had taken him to school on April 19th at nine A. M., did you thereafter that same day receive a call from the school?

A. Yes, sir.

Q. Were you advised in that telephone call that your son was not there?

A. Yes, sir.

Q. Will you tell us what you subsequently discovered with respect to his absence?

A. They called me up and told me——

Q. Who do you mean by "they"?

A. The school teacher called me and told me that Johnnie had gone——

Mr. Cohen: It is hearsay, your Honor. If you want it, all right.

The Court: It doesn't make any difference.

The Witness (Continuing): That Johnnie had gone and his father had taken him.

I said, "Who?"

She said, "His father."

I said, "How do you know it is his father?"

She said, "He said he was."

We contacted——

The Court: You went to the school pursuant to the telephone conversation?

The Witness: This was the telephone conversation.

The Court: You had a conversation with whom?

The Witness: The school teacher.

The Court: As a result of the conversation you had with the school teacher—What is her name?

The Witness: Mrs. McDermott.

The Court: What did you do as a result of that conversation?

[fol. 25] The Witness: I went up to the school. We contacted Mr. Hendricks.

The Court: Who is Mr. Hendricks?

Mr. Rosenberg: He is a Miami attorney.

The Court: You had a talk with him?

The Witness: I told him what happened. I went up to the school and wanted to know who took Johnnie and she said, "His father."

I said, "What did he look like?"

Q. Did you thereafter call New York City by telephone for the purpose of determining where the boy was?

A. Yes.

Q. When did you call New York, and whom did you speak to?

A. Well, we called——

Mr. Cohen: Not "we" but you.

The Witness: I called different people and then contacted this party that called up 309 West 19th Street, and they told us that—and they called me back and told us that little

John had answered the telephone. So, we called—my sister called. I was listening in on the extension.

Q. Just to cut this short——

The Court: I think most of it is hearsay.

Q. Did you speak to Mr. Halvey?

A. I spoke to him.

Q. On what day did you speak to him?

A. On Sunday.

Q. April 22nd?

A. Yes.

The Court: What date is that?

The Witness: Sunday, April 22nd.

[fol. 26] Q. Where was Mr. Halvey when you spoke to him?

A. He told me he was in Bay Ridge, Brooklyn.

Q. Did he tell you that he had the boy here with him?

A. He told me, yes.

Q. Did he tell you that he had taken the boy from Miami Beach?

A. Well, he did not tell me he took him; he said he had him here.

Q. When you lived here in New York with Mr. Halvey, will you describe in a general way the nature of your living accommodations here?

A. We had a four-room apartment on 8th Avenue, corner of 8th Avenue and 19th Street.

Q. Do you know how much the rental was for that apartment?

A. I think it was around $55—yes, $55 a month.

Q. Did you have any servants?

A. No, sir.

Q. In Miami, you say you are making your permanent home with your sister?

A. Yes, sir.

Q. Will you describe, please, the type of home in which you live in Miami with your sister?

A. We have a very big home, a ten-room home, right on the Bay. The house has a bay frontage of about 100 feet, with 300 feet of ground.

Q. Are there any servants in the home?

A. Yes, sir; we have two.

Q. Did your son attend a public or a private school?
A. A private school.
Q. Who paid for his tution?
A. I did.
Q. Since you left your husband in April of 1944, have you received any money from him?
A. No, sir.
Q. For yourself?
A. No, sir.
Q. Has he sent any money for the support of the child?
A. No, sir.
Q. What was your occupation prior to your marriage to Mr. Halvey?
A. Registered nurse.
[fol. 27] Q. For how many years had you been a registered nurse?
A. About sixteen years.
Q. You want to have the custody of your child, is that correct?
A. Yes, sir.

Mr. Rosenberg: You may inquire.

Cross-examination.

By Mr. Cohen:

Q. Were you happy during the first year of your married life?
A. Yes.
Q. You had known the defendant for ~~several years~~ before marriage?
A. Yes, sir.
Q. In fact, I think it is ten years, isn't it, that you went with him?
A. Perhaps.
A. Yes, sir.

The Court: Before being married?
Mr. Cohen: Before they were married.

Q. You were married in the State of New York?
A. Yes, sir.
Q. He had his business in the City of New York?
A. Yes, sir.
Q. What business was he in?

A. Trucking business.
Q. Under the name of the Halvey Trucking, Inc.?
A. Yes, sir.
Q. He had other interests besides, hadn't he?
A. Yes.
Q. What?
A. A garage on West 19th Street.
Q. Who owns that building?
A. I believe so.
Q. After the first year of your marriage, did anything occur with respect to your habits that caused him to be displeased?
A. I had no bad habits that I know of.
Q. Well, did you drink occasionally?
A. Socially; a few drinks.
Q. Did you drink alone, too?
A. No.
Q. Besides socially?
A. No, sir.

[fol. 28] Q. Isn't it a fact that you drank a good deal of beer and other intoxicating liquors?
A. I had an occasional glass of beer. I very seldom drank anything else.
Q. Very seldom drank anything else?
A. That is right.
Q. But, you did drink a good deal of beer?
A. I drank some beer.
Q. What would you say?
A. About two glasses of beer.
Q. Two glasses of beer?
A. Yes.
Q. When? What do you mean, two glasses of beer? In your entire lifetime?
A. No; once in a while.
Q. Once in a while?
A. Yes.
Q. Did you drink a whole afternoon?
A. No, sir.
Q. Did Mr. Halvey ever come home and find that you had friends in the house, or relatives, and you were all drinking beer?
A. On occasion, if I had guests, several glasses of beer.

Q. Did you object to his coming home, or express your disapproval of the fact that he came home and was interfering with your party?

A. No, sir.

Q. Never did?

A. No, sir.

Q. You never called him any names or abused him, did you?

A. No, sir.

Q. You never got drunk in your life, did you?

A. No, sir.

Q. Never did?

A. No, sir.

Q. How many meals did you cook for your husband during the past three years of your married life? I mean, during the three years prior to April 13th, 1944?

A. That I would not know. I never knew when Mr. Halvey was coming home in the evening. If I had dinner, he [fol. 29] would probably come in at nine or nine-thirty, ten or ten-thirty in the evening, and I told him if he could try and get home earlier than that, we would have dinner. He never did. I had dinner for my son, and I had dinner for myself.

Q. Did not he find fault with you because you did not prepare meals for both himself and his son?

A. He did not find fault. He would not come home to eat.

Q. He would not come home to eat?

A. He would come home at all hours of the night.

Q. Well, isn't it a fact that after your habits became——

Mr. Rosenberg: I object to the form of that question as assuming something not in evidence.

The Court: Reframe the question.

Q. Did Mr. Halvey come home on many occasions and find that you had been drinking?

A. No, sir.

Q. And were unfit and unable to stand on your feet?

A. No, sir.

Q. Did he have to help you to bed many times?

A. No, sir.

The Court: Did he have to help you to bed at any time?

The Witness: No, sir.

Q. Never?
A. No.
Q. Isn't it a fact that Mr. Halvey found his home——

Mr. Cohen: I withdraw that question.

Q. Did you go out to market for the family?
A. Yes, sir.
[fol. 30] Q. How often?
A. Whenever I had occasion to do it.

The Court: Every day?
The Witness: Every day.

Q. Did you ever visit Duffy's Tavern on 14th Street?
A. I was there, yes.
Q. How often did you go there?
A. Maybe on Sunday afternoon two or three of us would go there and have a couple of glasses of beer; a couple of ladies I knew.
Q. Only on Sunday?
A. Yes.
Q. Never on weekdays?
A. Never.
Q. During, let us say, the year prior to April 13th, 1944, how many meals did you prepare for your husband?
A. Whenever he came home for dinner he had a meal.
Q. You prepared his meal?
A. Yes, sir.
Q. What did you prepare?

Mr. Rosenberg: I object to that question.
The Court: Did your husband have breakfast in your home?
The Witness: Yes.

Q. Every morning?
A. As a rule.

The Court: Did he have breakfast with you and the boy?
The Witness: Well, yes.
The Court: And, did you prepare that breakfast?
The Witness: I did, or he did sometimes.
The Court: As a rule, who did?
The Witness: I did at times, and at times Mr. Halvey would do it.
The Court: What did breakfast consist of?

[fol. 31] The Witness: Coffee, toast——

The Court: What is that?

The Witness: Coffee and toast and eggs—anything he wanted.

The Court: What about lunch? Who prepared lunch?

The Witness: He didn't come home. I prepared Johnny's lunch and my own.

The Court: What about supper?

The Witness: Supper, I had Johnny's supper and my own. As I say, Mr. Halvey came home——

The Court: What time did you have supper?

The Witness: As a rule, six o'clock.

The Court: Six o'clock?

The Witness: Yes.

The Court: In other words, you are in the habit of eating at six o'clock, you and your son?

The Witness: Yes.

The Court: If Mr. Halvey was not home, what was the procedure; you would eat, anyhow?

The Witness: Yes. As a rule, I never knew when he was coming home; it was all hours.

The Court: All right; go ahead.

Q. He had a business, didn't he?

A. Yes, sir.

Q. Did you know where it was?

A. 13th Street—2 West 13th Street.

Q. The trucking company had an office in that building, did it not?

A. Yes, sir.

Q. It was an office building?

A. Yes. sir.

Q. How far was that from your home?

A. Six blocks, I imagine.

[fol. 32] Q. Isn't it a fact he had two girls working there?

A. I believe so.

Q. You have been in the office, haven't you?

A. Sometimes it was one, sometimes it was two. I don't know how many he has now.

Q. What time did they leave?

A. I don't know.

Q. What time did he leave?

A. I don't know.

Q. What time did Mr. Halvey leave in the morning?

A. Sometimes nine, sometimes nine-thirty, ten, ten-thirty, eleven.

Q. Were you ever in bed when he left?

A. Sometimes.

Q. Wasn't it always?

A. No.

Q. Your sister, the one that lives in Florida, is married to Mr. Hagerty?

A. Yes, sir.

Q. Mr. Hagerty is a wealthy man?

A. I presume so.

Q. He is an elderly man, isn't he?

A. Yes. Well, he is sixty-seven or sixty-eight, I believe—something like that.

Q. Your sister married him after attending him as a trained nurse?

A. Yes, sir.

Q. And then he went to Florida to live?

A. Yes, sir.

Q. He has grown children that live in New York?

A. I believe he has.

Q. This house that you refer to, this ten room house, is his home, is it not?

A. Yes; my sister's, too.

Q. How long is your sister married to him?

A. About eight years.

Q. They give you an apartment rent free, is that the idea?

A. I live right in the house. We have two rooms and a bath.

Q. Do you pay any rent for that?

A. No, sir.

Q. Did your sister urge you to come and live with her?

A. When my sister found out I was abused so much——

[fol. 33] Q. Will you answer the question, please?

A. Yes.

The Court: Did your sister ask you to come down and live with her? Is that it?

The Witness: Yes, sir.

Q. Do you do any of the work in the house?

A. I pitch in once in a while, when we might not have a maid for a day or two.

Q. There is a shortage of help in Florida?
A. After a fashion.
Q. Your sister needed assistance, isn't that why she asked you to come down?
A. No, sir.
Q. Does your sister drink, too?
A. No, sir.

Mr. Rosenberg: Wait a minute. I object to the question and move to strike out the answer.

The Court: Well, it is in.

Mr. Rosenberg: Pardon me?

The Court: I will strike it out if you want to. She said, "No."

Q. Did you drink with your sister while your boy was there?
A. We probably had an occasional glass of beer.
Q. Probably?
A. Yes.
Q. Don't you know?
A. An occasional glass of beer.
Q. You drank with your sister, didn't you?
A. A glass of beer.
Q. Not more than one glass?
A. As a rule, no.
Q. You drank in the presence of the boy?
A. Yes.
Q. Did you pay any rent for the home? Did you pay any rent for your home down in Florida?
A. No, sir.
[fol. 34] Q. Did you ever ask Mr. Halvey to contribute to the support of your boy?
A. No, sir.
Q. Or to yourself?
A. No, sir.
Q. Did you tell him in advance of your leaving New York that you were going?
A. I did not tell him in advance, no.
Q. Did you tell him you were going to take the boy?
A. No.
Q. Who took care of the boy while he was in New York?
A. I did.
Q. On Saturday and Sunday, who took care of the boy?

A. I took care of him on Saturday, and I took care of him on Sunday. His father took him out for maybe two or three hours on a Sunday afternoon. That is the only time I go away from that little boy.

Q. The only time you went away from him?

A. That's the only time I ever had that I was away from him.

Q. Did you want to get away from him?

A. I mean, the only time I was ever away from him was on Sunday afternoon for two or three hours. Mr. Halvey used to take him out.

Q. You had him on your hands all the time, is that right?

A. I didn't have him on my hands. He was my son, and I took care of him.

Q. He was not a burden to you?

A. No.

Q. There is no assurance that your sister will always want you and your son to live with her, is there?

A. Yes, sir.

Q. There is an assurance?

A. Yes, sir.

Q. What assurance?

A. She wants us there.

Q. Just her word, is that right?

A. What more assurance do you want?

Q. She may change her mind?

Mr. Rosenberg: I object to the question.

The Court: It is argumentative.

[fol. 35] Q. On Saturday afternoons, when you went to Duffy's Tavern——

A. I never went on Saturday afternoons.

Q. When did you go?

A. I went Sunday afternoon.

Q. Sunday afternoons?

A. Yes.

Q. That was the time you say you got rid of the boy?

Mr. Rosenberg: I object.

The Witness: I was not rid of the boy.

The Court: I don't know what you mean by that.

Mr. Cohen: I am using her own language.

The Court: Reframe the question.

Mr. Rosenberg: That is not her language; that is your language:

The Court: Strike it out; reframe your question.

Q. Were you there all afternoon on Sunday?
A. No, sir.
Q. How much of the day were you there?
A. Maybe an hour.
Q. Every Sunday?
A. Not every Sunday; an occasional Sunday.
Q. Whom did you go with?
A. Two women friends of mine.
Q. Did you ever have the boy there?
A. No. I think once he came in. It is a nice, respectable place. It is a restaurant.
Q. He came in of his own accord?
A. I was with him.
Q. You brought him with you?
A. He came in.
Q. Only once?
A. About once.
Q. About once? Was it more?
A. Well, once that I can recall.

[fol. 36] Q. You don't want your husband to have custody of this child at any time during the year, do you?

A. Well, I would like to have him. He is small. I would like to have him. I feel that I am perfectly able and everything to take care of that little fellow while he is small, and have a home life. When the child gets bigger, if he wants to go with his father, that will be up to him. If Mr. Halvey wanted him down in Florida, that is, in the event that you say I would have the boy, he could come down at any time he pleased, take Johnnie out any time he pleased, have dinner with him, bring him home in the evening; and if I come to New York, he could——

Q. You don't intend to come to New York, do you?
A. If I come to visit——
Q. You said you had no intention of coming to New York.

Mr. Rosenberg: Wait a minute. I object to the question as argumentative.

The Court: I will let her answer it. If counsel doesn't do it, I will do it.

Q. Do you ever intend to come back to New York?
A. No.

The Court: If you ever come back it will be on a visit?
The Witness Yes.
The Court: To whom?
The Witness: Well——
The Court: Who is here outside of Mr. Halvey that you know?
The Witness: I have friends.
The Court: You have?
The Witness: Yes.
The Court: How many?
[fol. 37] The Witness: Oh, about six or seven friends that I could stay with.

Q. You haven't done any work since you have lived down there, have you? I mean, you say you support your son as a registered nurse in your petition.

Mr. Rosenberg: Pardon me. There is no such statement in the petition. I object to the form of the question.
The Court: Reframe the question.
The lady says she does not work and that both she and the son are being supported by the sister or the brother-in-law, or both of them.

Q. That's quite plain, you haven't worked since you left?
A. I work in the house, after a fashion.
The Court: You are not being paid for what you do?
The Witness: Yes, sir; I get a salary.
The Court: From whom?
The Witness: My sister.
The Court: Your sister gives you a salary for what you do there?
The Witness: I get $35 a week.
The Court: A week?
The Witness: Yes.
The Court: What do you do for it?
The Witness: I manage the house and look after the maids, and I do the shopping, and I do things like that, you know, sew on a few buttons—things like that.
The Court: Do you have to pay for the tuition of your son at school?

[fol. 38] The Witness: I pay for that.

The Court: How much?

The Witness: Around $18.75 a month.

The Court: How much?

The Witness: About $18.75 a month.

The Court: You said "About."

The Witness: It is $18.75 a month.

The Court: Have you a bank account?

The Witness: I have; yes, sir.

The Court: In what bank?

The Witness: The Florida bank.

The Court: Where?

The Witness: In a Florida bank.

The Court: What is the name of it? Is there only one bank in Florida?

The Witness: I think it is the DuPont.

The Court: Is it a savings bank?

The Witness: Yes, sir.

The Court: Have you the bank book with you?

The Witness: No, I have not.

The Court: Do you buy your son's clothes?

The Witness: Some of them I do; some of them Mrs. Haggerty buys.

The Court: How does your sister pay you, by check?

The Witness: By cash.

The Court: By cash?

The Witness: Yes.

The Court: How much money have you in the bank?

The Witness: I have over $500 now.

The Court: You have accumulated that money while you have been out there working for your sister?

The Witness Yes, sir.

The Court: Do you buy your own clothes?

[fol. 39] The Witness: Well, I dress in slacks pretty much and I don't spend very much on clothes, your Honor.

The Court: Have you any present intention of living anywhere else but in Florida?

The Witness: No, sir; I intend to make that my home.

The Court: You intend to live there?

The Witness: Yes.

The Court: You started your action in February, 1945, is that right?

The Witness: Yes, sir.

The Court: When did you first go and see a lawyer with respect to a divorce?

The Witness: When?

The Court: When?

The Witness: I imagine it was probably a month before, something like that.

The Court: A month before?

The Witness: Yes.

The Court: When did the idea of a divorce occur to you?

The Witness: When did the idea——

The Court: Yes.

The Witness: Well, I knew I could never live with Mr. Halvey again, and I just thought I would get a divorce.

The Court: Have you any present intention of being married?

The Witness: No, sir.

The Court: Do you mind telling me what your religion is?

The Witness: Catholic.

The Court: Your boy is a Catholic, too?

The Witness: Yes.

The Court: He is brought up in the Catholic religion?

[fol. 40] The Witness: Yes.

The Court: This private school that he goes to, is that a religious school?

The Witness: No; it is a private school.

The Court: It is a private school?

The Witness: Yes.

The Court: It is not a Catholic parochial school, is it?

The Witness: No.

The Court: Does he go to church?

The Witness: Well, yes; we go to church on Sunday, St. Peter & Paul's Church.

The Court: What is the name of the church?

The Witness: St. Peter and Paul.

Q. Do you take the child to church?

A. Yes, sir.

Q. On Sundays?

A. On Sundays.

The Court: How often do you take him?

The Witness: I take him as often as I can. Not every Sunday. I take him occasionally.

The Court: Occasionally? How often do you go to church?

The Witness: Well, I go about three times a week—maybe three Sundays out of a month.

The Court: Out of a month?

The Witness: Out of a month.

The Court: How far is the church from your home?

The Witness: It is quite a distance. We have to use the car.

The Court: When did the boy start to go to school for the first time?

The Witness: He started in September.

The Court: In 1944?

[fol. 41] The Witness: Yes, sir.

The Court: Did he go to school before that date?

The Witness: Well, no.

The Court: When did he go to school?

The Witness: He went the day school opened.

The Court: Let me ask you this question: Did the boy go to school before you left your husband?

The Witness: No, sir.

The Court: He was too young for that?

The Witness: Yes.

The Court: At the time you left your husband, how old was the boy?

The Witness: He was six in February. I left in April.

The Court: He started school in September, 1944?

The Witness: Yes.

The Court: How old was he when he started school?

The Witness: He was six and a half.

The Court: What is that?

The Witness: Six and a half.

The Court: Was not that a little late to start a boy in school?

The Witness: They won't take them until they are six. You have that half a year, you see, and you either send him to a kindergarten or you keep him home.

Q. Outside of this bank account, have you any other moneys? Have you any other properties?

A. No, I have not. I have nothing.

Q. What did your husband give you per week?

A. As a rule I got $25 a week. That wasn't everything.

[fol. 42] Q. Didn't he give you $35 a week?

A. No, sir.

Q. And pay all the expenses of the household?

Mr. Rosenberg: I object to the form of the question.
The Witness: He did not.
Mr. Rosenberg: I object to the form——
Mr. Cohen: May I——
Mr. Rosenberg: I object to the form of the question. Counsel is testifying.
Mr. Cohen: I am cross-examining.
The Court: You may answer it.

Q. Tell us what was the arrangement between yourself and your husband with respect to household expenses? How much did he give you?
A. He gave me $25 a week.

The Court: $25 a week?
The Witness: Yes.
The Court: That was for what purpose? To buy food?
The Witness: For food, and buy Johnnie little things, stockings and underwear, and things like that.
The Court: Let me ask you this: You have no complaint in so far as his supplying you with money for household expenses, and otherwise is concerned; is that it? You don't claim that he failed to support you, do you?
The Witness: Well, he gave me $25 a week. That was all I had. That's all he gave me.
The Court: Was that sufficient?
The Witness: There were times when I would have to ask him for a little more.
The Court: Naturally. Did he object to giving you any more than $25 when you did ask?
[fol. 43] The Witness: No. When I asked he gave it to me.
The Court: In so far as support is concerned, you have no complaint against him?
The Witness: No.
The Court: Your complaint is that he treated you badly, or abused you?
The Witness: Yes, sir.
The Court: That's the reason why you left?
The Witness: Yes.
The Court: All right.
Did he ever abuse your boy?
The Witness: No, sir.
The Court: He did not?
The Witness: No, sir.

The Court: Would you say he loved your boy as a father does love a child?

The Witness: He loves him. He used to keep him up awfully late at night, twelve and one o'clock. He would read him stories, and stuff like that.

The Court: He did?

The Witness: Yes.

The Court: Did you object to that?

The Witness: Yes, I did.

Q. He opened a charge account for you in Wanamaker's, didn't he?

A. Yes.

The Court: What is that?

The Witness: I had a charge account in Wanamaker's.

Q. You could buy anything you pleased?

The Court: I could, I think, make a finding there is no question about support.

[fol. 44] Mr. Cohen: The purpose is to show the means of the respective parties.

The Court: I don't think it makes any difference. Even if I should find that this man is more wealthy, it makes no difference in so far as custody is concerned.

Mr. Cohen: Except that financial ability may enter into it if the boy is going to be destitute.

The Court: I don't think he is going to be destitute.

Mr. Cohen: If he is going to live on the whim of a sister——

The Court: I will take that into consideration.

Mr. Cohen: That's all. I have no further questions.

Redirect examination.

By Mr. Rosenberg:

Q. Mrs. Halvey, there have been a considerable number of questions asked on cross-examination with respect to your drinking habits. Tell me, are you in the habit of drinking hard liquors to excess, and I am not referring to beer at the moment?

A. No, sir; I rarely drink hard liquors, very rarely.

Q. Have you any recollection of ever having been drunk through the drinking of hard liquors?

A. No, sir.

Q. Were you a frequent drinker of scotch or rye, or liquors of that sort?

A. No, sir.

Q. This beer drinking that has been discussed, what did it consist of, drinking an occasional glass of beer?

A. Drinking an occasional glass of beer; having some friends come in and having a glass or two of beer, that's all.

[fol. 45] The Court: How often would the friends come in during the week?

The Witness: Once in a while.

The Court: What do you mean?

The Witness: It might have been once a week, and it might have been twice a week.

The Court: When he came in, would beer be in the house?

The Witness: I had beer in the icebox as a rule, yes.

The Court: Bottled beer?

The Witness: Yes, sir.

The Court: Did you buy the beer by the bottle or by the case, or how?

The Witness: By the bottle.

The Court: By the bottle?

The Witness: Yes.

The Court: How many bottles did you buy, one at a time?

The Witness: No. I probably would buy three, four or five. I would have them in the ice-box.

The Court: You always had some beer in the ice-box?

The Witness: In the ice-box.

Q. These weren't drinking parties, were they?

A. No, sir.

Q. You had people in and you had conversation and a glass of beer to go with it?

Mr. Cohen: Do you want to testify, counselor?

Mr. Rosenberg: I am trying to emulate your fine example, sir.

The Court: What about these visits to Duffy's Tavern? Did you go there every Sunday?

[fol. 46] The Witness: Not every Sunday; once in—you know——

The Court: How many beers would you have?

The Witness: Probably two or three.

The Court: How long would you stay there?

The Witness: Probably an hour or an hour and a half. There would be three or four of us ladies and we would talk.

The Court: What would happen to the boy?

The Witness: Sometimes his father would take him out on Sunday afternoon.

The Court: You didn't go there during the week, did you?

The Witness: No, sir.

The Court: What kind of a place is Duffy's?

The Witness: A nice place. It is a nice restaurant. It is a very respectable place.

Q. You say you prepared dinner each evening, is that right, Mrs. Halvey?

A. Yes, sir.

Q. For yourself and the boy?

A. Yes.

Q. If Mr. Halvey was home, did you prepare it for him as well?

A. Yes, sir.

Q. You said before, as I recall, that Mr. Halvey's habits with respect to returning home were irregular?

A. Yes, sir.

Q. How late at night did Mr. Halvey return home, on some occasions?

A. It would be ten, ten-thirty, eleven-thirty.

The Court: That was on account of business, was it?

The Witness: I don't know. I assume so.

The Court: All right.

[fol. 47] Q. On the nights he was home——

The Court: There is no woman involved, so far as he is concerned?

The Witness: No.

The Court: So far as you know?

The Witness: No.

Q. The nights he was home, you prepared dinner for him, is that correct?

A. Yes.

Q. Did you ever refuse to prepare dinner for him?

A. No, sir.

Q. Are you and your sister approximately the same age?

A. About two years' difference.

Q. What are your respective ages?
A. I am 44 and my sister——

The Court: What is that?
The Witness: I am 44 and my sister is 46.

Q. Is the relationship between you and your sister a close one?
A. Well, yes. We have been together pretty much. We trained together.

The Court: Have you any other sisters?
The Witness: Yes; I have one in Brooklyn.
The Court: In Brooklyn?
The Witness: I have two sisters in Canada, older sisters.
The Court: Is your father and mother alive?
The Witness: My father is alive; my mother is dead.
The Court: Where is your father?
The Witness: He is in Norwich, Connecticut. He is ninety-four years old.
The Court: With whom does he live?
The Witness: With my brother and his nephew and his wife.

[fol. 48] Q. Your sister did not invite you to Florida to be her servant, did she?
A. No, sir.
Q. What is your status in the home? Are you a member of the household or are you a servant there?
A. I am a member of the household.

The Court: But, you are paid for whatever you do there, $35 a week?
The Witness: Yes.
The Court: You don't pay for the food you eat in the house, do you, Mrs. Halvey?
The Witness: No, sir.

Q. You have a complete maintenance, is that correct?
A. That is right.

The Court: Who pays you, your sister or your brother-in-law?
The Witness: Well, my sister.
The Court: Your sister?
The Witness: Yes.
The Court: Do you really get paid?
The Witness: Yes.

The Court: Tell the truth?
The Witness: Yes.
The Court: You do?
The Witness: Yes, sir.
The Court: You mean that?
The Witness: That's right.
The Court: That's all.
Mr. Rosenberg: That's all.

Recross-examination.

By Mr. Cohen:

Q. Mrs. Halvey, Mr. Halvey had a bungadow in Rockaway, didn't he?
A. Yes, sir.
Q. And you spent your summers there?
A. Yes, sir.
[fol. 49] Q. Did you do any drinking out there?
A. No, sir; not any more than I did any place else.
Q. What did you do with the empty bottles when you finished?
A. Brought them back to the store.
Q. Did you ever throw them under the building?
A. No, sir.

The Court: At Far Rockaway?
Mr. Cohen: At Rockaway; yes.

Q. Did any of the neighbors ever have to come into the house and subdue you?
A. No, sir.

Mr. Rosenberg: Wait a moment. I object to it.
The Witness: No, sir.
Mr. Rosenberg: I object to the question as improper in form.
The Court: It has been answered.

Q. Did you ever get drunk in Rockaway?
A. No, sir.

The Court: You have never been drunk in your life?
The Witness: No, sir.
The Court: That's your position?

The Witness: Yes.
The Court: All right.

Q. This sister that is in New York, that lives in New York——
A. Yes, sir.
Q. Did she ever visit you at the house?
A. Yes, on occasion.

The Court: Do you mean in New York?
Mr. Cohen: In New York.

[fol. 50] Q. Did she observe the relations between you and your husband?
A. That I would not know.
Q. Didn't she know something about your habits?
A. No, sir. I saw her——

The Court: Was she ever at home when your husband abused you?
The Witness: She saw him hit me once.
The Court: Once?
The Witness: Yes.

Q. Didn't she live with you one summer, one entire summer in the bungalow?
A. Yes, she and her young baby.

The Court: Where is that sister now? Is she still in Brooklyn?
The Witness: In Brooklyn.

Q. Could you get her here?
A. What is that?
Q. Would you get her here?
A. Yes, if she wants to come.
Q. If she wants to come?
A. I can't make her.

The Court: What is that?
The Witness: I can't make her. I say, if she wants to come.

Q. Did she ever accuse you of being a dipsomaniac?
A. No, sir.

Mr. Cohen: That's all.
The Witness: How would she know, sir?

Q. How would she know?
A. Yes.
Q. Didn't she live with you?
A. Yes. Who is to know. You can't say a person is a dipsomaniac.

The Court: Well——
The Witness: That takes a lot more than her to tell that. That's an unfair question.

[fol. 51] Q. Isn't she also a registered nurse?
A. She is. She still is in no position to say that anyone is a dipsomaniac.
Q. Did she say it?
A. If she did, I don't know it.
Q. Did your sister ever tell you that you were a dipsomaniac?
A. Not that I know of. She never told it to me.
Q. Did your sister ever see you drunk?
A. No, sir.

Mr. Cohen: That's all.
The Court: All right, madam.
Is that your case?
Mr. Rosenberg: That's the plaintiff's case.
Mr. Cohen: I renew the motion made at the outset, upon the same grounds then urged.
The Court: I will take the motion under advisement.

Mr. Cohen: Mr. Halvey.

JOHN F. HALVEY, residing at 303 West 19th Street, Manhattan, New York, the respondent, called as a witness, being first duly sworn, testified as follows:

Direct examination.

By Mr. Cohen:

Q. How old are you?
A. Fifty seven years old.

Q. You went with your wife for about ten years before marriage?

A. Yes, sir.

Q. Did she——

The Court: What is the date of the marriage?

[fol. 52] Mr. Rosenberg: April 10th, 1937, sir.

The Court: All right.

Q. The boy was born on February 8th, 1938?

A. February 4th, 1938.

Q. February 4th, 1938?

A. Yes.

Q. You lived with her at that time at 303 West 19th Street?

A. 300 West 19th Street. No, at 300 West 21st Street. 21st Street is where we lived when the child was born, if that makes any difference.

Q. Will you state when there was any trouble between you and your wife for the first time?

A. I should judge about three years back. I used to come home—do you want me to tell the——

The Court: Three years after the child was born?

The Witness: About two years after the child was born. I would come home at night, my wife would be intoxicated, without any question of doubt, and at times she would get in a fighting pose immediately, and I would have to try to get her into bed. She would fight her way clear. She wouldn't go to bed. She used the worst language that ever came out of a woman's mouth, called me the most vile names and the most indecent language in the presence of that child, told me to go out and get plastered, that it would do me all the world of good, and to go out and get myself laid.

She refused to perform any of the duties of a married woman. She refused to cook for me. There was never anything in the icebox.

All this talk about my being late—I was within walking [fol. 53] distance. I finished my work at 238 West 19th Street, which was directly across the street from where I lived, and that was the purpose of my living there, to be within walking distance of my home. There was never anything in that icebox to eat. That woman definitely refused to cook a meal or do anything or perform any of her duties. The house was filthy and dirty. She was in a state of

drunkenness,—she was asleep when I came home, in bed when I left in the morning.

It was my thought that when she went to Florida, she departed, left a note that she was leaving; by the time I read the note, she abandoned her home. But, she did say "I will be back."

Mr. Rosenberg: Wait a moment.

The Court: She did not say——

The Witness: She said, "I will return."

The Court: What did she say in the note?

The Witness: I have the note. Do you care to read it? That's note No. 1.

The Court. Do you offer it in evidence?

Mr. Cohen: I have no objection.

The Witness: Is that your writing?

The Court: Just a minute. Is that the note?

Mr. Cohen: While they are looking at that, I have a case in 77 Miscellaneous that I would like your Honor to read.

The Court: I will take that later. On what question?

Mr. Cohen: On the question of whether or not the provision of a final decree of divorce is conclusive or not.

The Court: What is the name?

Mr. Cohen: Ex Parte Stuart, 77 Miscellaneous 524.

[fol. 54] Mr. Rosenberg: No objection, sir. I do want to point out, however——

The Court: Just a minute. Did you write that? That is your handwriting? "I had to get away—will be back." That is part of your handwriting?

Mrs. Halvey: Yes.

The Court: Mark it in evidence.

(Received in evidence and marked Respondent's Exhibit A.)

Mr. Rosenberg: A part of the exhibit is covered on the fourth page. There has been something pasted over it on the fourth pages.

The Court: You can read right through it. Do you want your client to write over it so there will be no question about it? What is this pasted over there?

The Witness: That's the way I got the note. It stuck to the flat of the envelope. It is easy to remove. It is just the tissue of the envelope.

The Court: I think you can almost read through it. It doesn't make any difference. Is that what you wanted to call attention to?

Mr. Rosenberg: Yes.

The Court: I will have to read it again. I went through it very fast. Go ahead.

Q. Tell us, if you please, when these incidents that you refer to took place?

A. Daily—it was a daily occurrence. The woman was constantly drunk from the time—she was never out of bed when I left in the morning. She never gave me my breakfast. If I got any breakfast, I got it myself. I never could come for supper, there was nothing in the icebox. I went to a butcher shop, purchased the meat, bought it, and put it in the icebox.

[fol. 55] It got so bad that I had to take that child out to eat at night. I would come home at night and say "Did you eat?"

He would say, "No."

I had to take him out and take him to a restaurant. I worked all week. I worked hard at my business. I have three different businesses. It is no easy matter for a man to go out and do that, and on Sunday he would like to sit down. I couldn't leave the child — be lugged to Duffy's Tavern, which is a Sunday occurrence. I took him with me wherever I went.

I took him mostly so that that child—the child will tell it to you if you ask him.

Q. Where did you take him?

A. I took him to hockey games, restaurants; I took him to the circus; I took him to the rodeo; I took him to the funny movies, which he enjoyed very much, Charlie Chaplin and things of that nature. He seemed to enjoy it very much.

I brought him home one day—the weather got very bad, I recall—this was in the winter, and it started to rain and snow. At four o'clock, I returned with him. He loved hot dogs. He asked me to buy him a hot dog. You know, children like them. I bought him this hot dog and a bottle of pop at four o'clock in the afternoon. Then I stayed in the house listening to the radio.

Mr. Rosenberg: Is this in response to a question?

The Court: It is perfectly all right.

The Witness: It won't do any harm. You can ask me anything you care to afterwards.

The Court: Go ahead.

[fol. 56] The Witness: I brought him home at four o'clock on a Sunday afternoon, after he had that. At nine o'clock I witnessed him being put to bed. I would hear the lady take a trip to the kitchen, or somewhere, and the noise of bottles, like if they were in the process of being opened and poured.

So, at nine o'clock, when he was being put to bed, I said, "Where are you going with that child?"

She said, "I am putting him to bed."

I said, "You don't mean to tell me you are going to put that child to bed with a hot dog, to stay in bed until tomorrow morning at nine o'clock, about eighteen or twenty hours before he gets any additional food?"

She said, "Yes;" he is full.

I had to put the clothes on the child and take him out to Bickford's Restaurant, so he would not go to bed with an empty stomach.

I wasn't home at night as a rule, but it wasn't that I didn't want to be home, it was because I wasn't wanted. When I came home and interfered and made my presence known, immediately I was called all sorts of vile names for the reason that I was breaking up a drinking party, and this woman drinks continuously alone. I have thrown as much as fifty empty beer bottles out. I was so ashamed of it down at the Rockaway bungalow that I carried them four bungalows to put them in someone else's garbage, I was that ashamed of them.

The Court: Did you ever strike your wife?

The Witness: Never did, only in the course of a struggle during intoxication.

[fol. 57] The Court: Did you ever give her a black eye?

The Witness: I think she may have got a black eye as a result of the tugging and pulling.

The Court: All right.

Q. She said that you came home evenings at nine, ten or eleven o'clock?

A. Yes.

Q. Did you come home at that hour?

A. Sometimes. I came home at nine. I never came home as late as ten. I could have been there every night at seven.

Mr. Rosenberg: I move to strike out the last part of the answer as not responsive.

The Court: We have no jury here, Mr. Rosenberg.

The Witness: That's all right.

The Court: It is all for my benefit. We have no jury.

The Witness: Go ahead.

The Court: If you want to be meticulous in your objections, it is all right.

Q. Why did you come home late?

A. I came home late——

The Court: I think I understand.

The Witness: I went to eat in a restaurant.

Q. Did you stay out, walk around the streets?

A. No. I came home, and when I came in the house, the abuse started, I got called dirty sons of bitches and bastards, the worst man in the world.

The Court: Just answer the questions.

[fol. 58] The Witness: I hope you won't take offense at that.

Q. Did you go out?

A. Then——

The Court: Did you go out; yes or no?

The Witness: Then I would go out.

Q. What did you do?

A. I used to try and find a place to go. I don't drink.

The Court: You don't drink?

The Witness: I will say I drink two drinks in six months, if it is a special occasion. I am not against drinking.

The Court: What kind of drinks?

The Witness: I may take a highball on a special occasion.

The Court: All right.

The Witness: Now——

Q. Where did you go?

A. I used to have to go out, on cold winter nights, go in a cafeteria, buy the News to read it and then I would go out

and come back and stand in a corner in the bitter cold so as my life would be at least bearable.

Q. You sat in restaurants?

A. I sat in cafeterias for hours at a time in the cold winter when I couldn't go home.

Q. Did she ever, to your knowledge, go to Duffy's Tavern with the boy?

A. Took the boy, went to Duffy's Tavern every time that I didn't take him out, and the purpose of my taking him was to keep him from Duffy's Tavern, and also the company she kept, which seemed to me—I didn't know them well—to be of that type.

Q. How often did you take the boy out?

A. Every Sunday of my life, for years. Well, I won't [fol. 59] say for years. The child is only seven. It—I will say a year and a half, wherever I went, I took him. I had to forego any other appointments I might make.

Q. Where did you go with him? I mean, did you spend the entire day with him?

A. The entire day until evening, and then stayed with him until he went to bed.

Q. What time did you leave the house with him?

A. I would leave the house sometimes at noon. I had to get him his first meal in Bickford's Restaurant.

Q. Where was your wife in the meantime?

A. My wife in the meantime would be——

Mr. Rosenberg: Unless the witness is testifying as to his own knowledge where the wife is——

The Witness: I will tell you. I invited her to come with me and she declined.

The Court: All right.

The Witness: Is that sufficient?

Q. Did she ever go to church on Sunday?

A. She never went to church. She said it is a racket.

Q. Did you go to church?

A. I did go to church, and took the child, to a Catholic Church.

Q. Are you a Catholic?

A. Yes, I am a Catholic.

Q. What is your occupation?

A. I am in the trucking business. I have some real estate.

Q. As to the trucking business, what is the name of that trucking business?

A. Halvey Trucking.

Q. Where is it located?

A. 2 West 13th Street.

Q. What is the nature of that business?

A. It is a business—It is a special sort of business. We have carload shipments. We are more of an agent than a truckman. Out of town people ship to us and we represent them and distribute here.

[fol. 60] Q. How many trucks do you have?

A. We have at the present time sixteen trucks. We ordinarily operate twenty-five. Ours is not a war business.

Q. Do you have a substantial income from that business?

A. Yes, we have a very substantial income. It is a profitable business.

Q. Do you have real estate besides that?

A. In my own name I have some real estate that is unencumbered; that is, it has no mortgage.

Q. Where?

A. I own 232 to 38 West 19th Street, and I also own 260-262——

The Court: I don't believe you need to go into the financial picture.

The Witness: You are satisfied that I can maintain the child if it gets to that point?

The Court: That question is not involved here so far as I am concerned, unless it is brought up on cross-examination.

Q. When you lived——

The Court: I would like to know where the child has been since he has come here; what facilities he has for keeping the child; supporting the child, or otherwise.

Q. Tell us about the child.

A. The child and I are very much attached to one another, as far as I can see. The child reciprocates the love I have for him.

The Court: Where did you have him since he has been here?

The Witness: I have had him at my home.

The Court: Does he go to school?

The Witness: No. I haven't taken him to school, for the [fol. 61] reason that I had a telephone from Florida that "If we get him in Florida, you will never seen him again."

I have made arrangements—I went to St. Ann's Academy on 76th Street and Lexington Avenue, and I spoke to the person in charge there, the Brother in charge of that Academy, and he said to me that he would take the boy, but he can't take him in mid-term. He couldn't have been gotten out of that place. He said "We don't take in any starters in mid-term. If you will register him in June, I will start him in September for you."

Q. Is that a private academy?

A. It is a private academy. It has a Grade A rating.

Q. Were you willing to pay his tuition there?

A. I will pay his tuition and maintenance, or whatever is required.

Q. Did you pay the household expenses yourself?

A. I paid—you mean—at home——

Q. At home?

A. During this period?

Q. Yes.

A. Oh, sure.

Q. What did you give your wife?

A. You mean at the present time or in the past?

Q. When you lived together?

A. I gave her $35 a week, and I told her if she didn't stop drinking, I would have to take some of it off. She had nothing to do with the money but spend it.

Mr. Rosenberg: Your Honor has made a statement about my being meticulous. I am not seeking to be meticulous, but the question is merely a springboard each time for the witness to make a speech about many subjects.

The Court: I will say this much. In so far as support is concerned, he can well support the child. Apparently, [fol. 62] there has been some misunderstanding between husband and wife, as a result of which the child may have to suffer.

I am quite satisfied that the father could support him. I am satisfied that the mother might be, also, a good person to have custody. It is one of those cases where, apparently, the parties cannot get together. Probably no question would be involved if they both lived in the City or the State. The

father is entitled to visitation. I am going to see that he gets it, if I have any say in the matter.

Mr. Cohen: The visitation that they want to give is this: He can see him any time he wants to, in Florida.

The Court: That's probably not sufficient.

Mr. Cohen: I want to bring out the fact——

The Court: I think I understand it all. I think you can leave the rest to argument.

Mr. Cohen: Possibly your Honor would like to hear the child.

The Court: I am going to talk to the child. I am going to talk to him without the presence of anybody and with the consent of all the parties here. Are you satisfied that I speak to your child?

Mrs. Halvey: Yes.

Mr. Halvey: Yes.

Mr. Cohen: Then, I will have nothing further to offer.

The Court: I have a pretty fair idea of what this is all about.

Mr. Rosenberg: I should like to say this, however. If you speak to this child in the absence of all the parties, consideration must be given to the fact that these past two weeks the father has alone been in the presence of the child. [fol. 63] The child is of an impressionable age.

The Court: There is no question about that.

Mr. Cohen: What about the fact that the child was with the mother for an entire year?

The Witness: He was away a whole year. Are you finished with me?

The Court: I think you are through. Do you want to cross-examine him?

Mr. Rosenberg: I should like to.

The Court: Go ahead.

Cross-examination.

By Mr. Rosenberg:

Q. Mr. Halvey, as I understand it, you said that the trouble with your wife began two years after you were married?

A. I said, approximately.

Q. Is that correct?

A. I said, approximately. About, yes; about two years after. I will say yes to that.

Q. That was in 1939?
A. '39? This is '45, isn't it?
Q. You were married in 1937, sir, is that right?
A. I think so; yes.
Q. You say that trouble began approximately two years afterwards?
A. Yes.
Q. That was in 1939, wasn't it?
A. Yes; that was the beginning.
Q. As I understand it, you say that she was drunk?
A. Yes, I will say she was drunk.
Q. Continuously?
A. Continuously for two years.
Q. Please, just answer my questions.
A. Well, I will answer it.
Q. Just answer my questions, please.
A. All right.
[fol. 64] Q. She was drunk for approximately two years?
A. Yes.
Q. In fact, she bordered on being a dipsomaniac?
A. Her own family said so.
Mr. Rosenberg: I move to strike out the witness's statement.
The Witness: All right.
Mr. Cohen: Mr. Halvey, don't make any comment; just answer the question.
The Witness: All right; I will. Go ahead.
Q. You say that she was over that period of time continuously drunk?
A. Yes.
Q. This condition continued throughout the years?
A. Yes.
Q. She was drunk during the day?
A. Yes.
Q. She was drunk at night?
A. At night.
Q. She was obscene?
A. Obscene.
Q. Is that what you say?
A. Yes.
Q. Violently obscene?
A. Violently obscene.
Q. In a fighting mood?
A. In a fighting mood at all times.

Q. This condition started in 1939?

A. Yes; I would say about that time.

Q. You two continued to live together until 1944, is that so?

A. Yes.

Q. During the week when you went to work, you left that child?

A. Yes.

Q. With this woman?

A. Yes.

The Court: With what woman?

Mr. Rosenberg: With his wife.

A. Yes.

Q. And she was drunk; yes or no?

A. Yes.

Q. Were you attached to that child?

A. Very much.

[fol. 65] Q. When you left home, your wife would be violently drunk?

A. Not violently drunk—drunk. She was never sober, I said.

Q. And day after day you left this child with this drunken woman, you say?

A. Yes.

Q. This drunkenness, you say, started when the child was approximately a year old?

A. I will say it started when he was approximately two.

Q. It started, you say, the drunkenness, about two years after marriage, is that right?

A. Say two years afterwards.

Q. The child was born one year after marriage, wasn't he?

A. Yes.

Q. So the child was one year old when the drunkenness started?

A. That is, in a mild form.

Q. Didn't you just say—

A. I said it got unbearable.

Q. I haven't finished my question.

A. Go ahead, you ask it.

Q. Thank you, sir. Didn't you say a few moments ago—

Mr. Rosenberg: I withdraw the question.

Q. Didn't you say a few moments ago that this woman starting with two years after marriage, became a habitual drunkard?

Mr. Cohen: No. He said for two years continually she was drunk.

The Witness: She was drunk for the past two years prior to her departing.

The Court: I am not passing on the question of who is at fault.

Mr. Rosenberg: I will tell you what I am trying to prove. I am trying to prove this witness's testimony is wholly incredible.

The witness: Why?

[fol. 66] Mr. Cohen: Mr. Halvey, keep quiet.

Mr. Rosenberg: That he has here a boy that he says he is deeply attached to. If this woman—please, sir, don't interrupt. If this woman even vaguely approximated the condition that this man said she was in continuously, it isn't conceivable that a father that loved his son would daily walk out and leave a baby in the presence of a violently drunk, obscene woman.

The Court: Let's go on.

Q. You say you struck your wife on occasions?

A. I didn't say it.

Q. Did not you testify that she received a black eye at your hands?

A. I said during a struggle, she was in the fighting mood by the time night came—she started in the morning—during her sleeping hours she wasn't drunk, I don't think, she was recovering.

Q. And you lived with this woman, you say, for about five years during which time she was continually——

The Court: All of that is argumentative.

The Witness: I didn't say that.

The Court: I am not interested in these habits any more. I think you have gone far enough. I am interested in the welfare of the boy. I would like to know the extent of my jurisdiction and what can be done under the circumstances, considering all of these facts.

Mr. Rosenberg: May I——

The Court: I have my own ideas as to what the fights were. Enough has been brought out for me to form a conclusion.

[fol. 67] Mr. Rosenberg: May I put Mrs. Halvey back on the stand with respect to some of the statements made by Mr. Halvey?

The Court: I take it, if she takes the stand, she is going to testify that everything he said is not so; she is going to reiterate her testimony on direct. She is not going to add anything in rebuttal.

Mr. Rosenberg: And will make specific denials.

The Court: I assume she will do that.

Mr. Rosenberg: Of the various alleged statements of fact that were testified to by Mr. Halvey.

The Court: I will take it that if she takes the stand she is going to make plain her position on your direct case, and if he were to take the stand he would maintain his position, unless you want to put other witnesses on the stand—it is up to you people. In so far as the parties themselves are concerned, probably I have enough testimony on the facts of the case.

If you have other witnesses, we will adjourn the matter until ten o'clock tomorrow morning and we will go on.

Mr. Cohen: I have no further witnesses.

The Court: What about you?

Mr. Rosenberg: No. I think I will stop here.

The Court: Then, I will talk to the boy.

I will reserve decision, and I will take a memorandum. Exchange them by Wednesday. If you have any reply memos, I should like to have them on Friday. If you find you can't have them on the specified dates, call up [fol. 68] my secretary and ask for more time, and he will be very lenient, so far as that is concerned.

On the consent of the parties, and on the order of the Court, the mother will be permitted to have the custody of the boy pending the decision of the Court between the hours of two and four o'clock in the afternoons. You may call for the child at the home of the father—where is it?

Mr. Halvey: If it is agreeable to you, at my office, 2 West 13th Street. You may call for the child at that address.

The Court: You may take the child anywhere with you between two and four and bring the child back at five o'clock.

If you want to go to a movie, go to a movie with him.

On Sundays, the boy will be at the home of the defendant at 303 West 19th Street, Apartment 43. You will call for the child there at two o'clock and return him at five.

Both parties are here, and I want both of you to listen carefully to what I have to say. If there is a violation of the Order of the Court, I shall take drastic action against the party that violates the order.

[fol. 69] RELATOR'S EXHIBIT 1

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT

IN AND FOR DADE COUNTY, FLORIDA

Chancery No. 90191-F

ROSE HALVEY, Plaintiff,

vs.

JOHN F. HALVEY, Defendant

FINAL DECREE OF DIVORCE

This cause coming on this day to be heard upon the bill of complaint of the plaintiff, a decree *pro confesso* having been duly and regularly entered against the defendant, the report of the Special Master upon the testimony of the plaintiff and witnesses in said cause, and it appearing unto the Court that the equities of the cause are with the plaintiff and that she is entitled to the relief as prayed for her in her bill of complaint, and the Court being otherwise fully advised in the premises,

It is ordered adjudged and decreed that the report of the Special Master be and the same hereby is ratified and confirmed in all respects.

It is further ordered adjudged and decreed that the bonds of matrimony now and hitherto existing between the plaintiff and defendant be and the same are hereby forever dissolved, and the plaintiff, Rose Halvey, and the defendant, [fol. 70] John F. Halvey, be and they are hereby divorced each from the other, *a vinculo matrimonii*, and they are hereby restored to all of the rights and privileges of single persons.

It is further ordered adjudged and decreed that the permanent care, custody and control of the minor child of

the marriage, to-wit, John A. Halvey, be and the same is hereby awarded to the plaintiff, Rose Halvey.

Done and ordered at Miami, Dade County, Florida this 20th day of April, A. D. 1945.

Marshan C. Wiseheart, Circuit Judge.

[fol. 71] RELATOR'S EXHIBIT 1

STATE OF FLORIDA,
County of Dade ss:

I, E. B. LEATHERMAN, Clerk of the Circuit Court in and for Dade County, Florida, do hereby certify that the foregoing is a true and correct photostat copy of the Final Decree of Divorce filed April 20, 1945 and recorded on April 21, 1945 in Chancery Order Book 723, at Page 508, in the case of Rose Halvey, Plaintiff, against John F. Halvey, Defendant, in Chancery Case No. 90191, according to the files and records of this office.

In Witness Whereof, I have hereunto set my hand and affixed my official seal on this the 24th day of April, A. D. 1945.

E. B. Leatherman, Clerk Circuit Court, Dade County, Florida. (Seal.)

[fol. 72] RELATOR'S EXHIBIT 1

STATE OF FLORIDA,
County of Dade ss:

I, Ross WILLIAMS, Judge of the Circuit Court of the Eleventh Judicial Circuit of the State of Florida, in and for the County of Dade, do hereby certify that said Court is a court of record, and having a Clerk and a Seal; that E. B. Leatherman, who signed the foregoing attestation, is the duly elected and qualified Clerk of the said Circuit Court of the County of Dade and State of Florida, and was at the time of signing said attestation; that his said signature thereto is genuine, and that all of his official acts as such Clerk are entitled to full faith and credit.

And I further certify that said attestation is sufficient and in due form of law.

Witness my hand and official signature, this the 24 day of April, A. D. 1945.

Ross Williams, Judge of the Circuit Court of the Eleventh Judicial Circuit of the State of Florida, in and for the County of Dade. (Seal.)

[fol. 73] RELATOR'S EXHIBIT 1

STATE OF FLORIDA,
County of Dade ss:

I, E. B. LEATHERMAN, Clerk of the Circuit Court of the County of Dade and State of Florida, do hereby certify that the Honorable Ross Williams, whose name is subscribed to the preceding certificate, is Judge of the Circuit Court of the Eleventh Judicial Circuit of the State of Florida, in and for the County of Dade, and that the signature of said Judge to the foregoing certificate is genuine, and that said certificate is sufficient and in due form of law.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, this 24 day of April A. D., 1945.

E. B. Leatherman, Clerk Circuit Court, Dade County, Florida.

[fol. 74] RESPONDENT'S EXHIBIT A

John

When you get this I & Johnnie will be well well on our way to Florida—left this morning.

I left this way because I was afraid of my life & Johnnie's life too.

Now you will have plenty of time to sit & think of the inhuman treatment you gave the both of us.

That stuff of about me drinking is nothing but a cover for your brutal & sadistic character. You know that as well as I do—if you didn't have those "kinks" you would of never subjected me & Johnnie to what you did——

I did this myself—I bought tickets & all with my money—no one knows why I left—I'll leave the smearing to you.

As for the Farrells as long as I've known them they have told you were crazy.

Lou is the last person I'd see Johnnie with—that is why I had a fight with her at Xmas. I resented the treatment Johnnie got—he will be no foot-ball for her brat.

I never made any trouble for you at any time—I want none from you—remember that—Johnnie is my son—I intend to keep him. May God forgive you and any one else. You will all be paid with the coin you spent.

My address will be 3950 Crystal View Ct. Miami. c/o Hagerty.

Rose

I had to get away
will be back.

[fol. 75] IN THE SUPREME COURT OF NEW YORK

OPINION

By MR. JUSTICE BENVENGA

Matter of Halvey (*Halvey*)—This proceeding involves the custody of a seven year old boy. His parents were married in 1937, and he was born in 1938. In April, 1944, while his parents resided in the City of New York, the petitioner left her husband and, without his knowledge and consent, took the boy with her. Since then petitioner and her son have lived in Florida. In February, 1945, petitioner filed a suit for divorce in Florida, obtaining an order directing the service of process by publication. Defendant never appeared in that action. In April, 1945, a default decree was entered granting a divorce to the petitioner and awarding to her the custody of the boy. Just before the signing of the decree, defendant, without the knowledge and consent of petitioner, brought the child back to the City of New York. The question presented is whether the defendant is entitled to visitation and access to the child; and, if so, whether this court has jurisdiction and authority to grant and enforce that right.

It is well settled that a judgment of a foreign court, having jurisdiction of the action and of the parties, awarding custody of an infant to one of the parties, has the same force and effect in another jurisdiction that it has in the jurisdiction where it was rendered. It is binding

on the parties as a conclusive determination of the right to custody under the conditions existing at the time of its rendition, and a change of custody will not be decreed unless circumstances arise which make it necessary for the best interests of the child (Ansorge *v.* Armour, 267 N. Y., 492, 498-499; People ex rel. Herzog *v.* Morgan, 287 N. Y., 317, 320; People ex rel. Tull *v.* Tull, 245 App. Div., 508, 510, aff'd 270 N. Y., 619; Matter of Bull, 266 App. [fol. 76] Div., 290, 291-292, aff'd 291 N. Y., 792; Matter of Jiranek, 267 App. Div., 607, 610).

Did the Florida court have jurisdiction of the action and of the parties? This, of couse, depends upon whether the petitioner and her son were domiciled in Florida. It is not disputed that when the action was started petitioner and her son were residents of Florida. Since no evidence was adduced to show that the petitioner was not a bona fide resident, the Florida decree, in so far as its divorce provisions are concerned, is entitled to full faith and credit (Master of Holmes, 291 N. Y., 261, 273; Matter of Bingham, 265 App. Div. 463, 466). But there is doubt as to whether, under the circumstances of this case, the child was domiciled in Florida and whether the custody provisions of the decree are entitled to full faith and credit. No case authority on that point has been called to my attention and none has been found. It has been asserted that where a married woman is the joint guardian of the children with her husband as in New York (Dom. Rel. Law, sec. 81) the domicile of the children is that of the mother whenever she establishes a domicile apart from her husband and the children actually live with her. (Goodrich, Conflict of Laws, 2d Ed., p. 32; Restatement, Conflict of Laws, sec. 32; id., N. Y., Annot., sec. 32; 1 Beale, Conflict of Laws, sec. 32.2; Matter of Thorne, 240 N. Y., 444, 449; Finlay *v.* Finlay, 240 N. Y., 429, 431; but see People ex rel. Brooks v. Brooks, 35 Barb., 85, 86, 91-95). In view of the growing liberality with respect to acquisition of a separate domicile by married women and the equally growing liberality in permitting the mother to control the domicile of her children [fol. 77] (see Stumberg, Conflict of Laws, p. 43, note 95), it will be assumed that the custody provisions of the decree are entitled to full faith and credit. But even if it be assumed that they are not, the best interests of the child would seem to require that the petitioner should have his custody, for a child of tender years is entitled to such

care, love and discipline as only a good and devoted mother can usually give (Ullman *v.* Ullman, 151 App. Div., 419, 424-425).

But the question still remains whether the defendant is entitled to the right of visitation. True, the Florida decree does not provide for visitation. That is no obstacle. The decree in no way diminishes the prerogative of this court, as parens patriæ, to do what it considers best for the welfare of the child (People ex rel. Herzog *v.* Morgan, supra; Matter of Bull, supra).

Though the decree awards custody to the petitioner, defendant possesses certain natural rights with respect to his child. One of these is the right of visitation and access. This right cannot be withheld, unless the defendant has forfeited the privilege by his conduct, or unless the exercise of the privilege would injuriously affect the welfare of the child, or unless the decree specifically provides otherwise, and there has been no change of circumstances (Jacquet v. Di Simone, 175 La., 617, 143 So., 710, 711; Eaton *v.* Eaton, 237 S. W. 896, 900 [Mo.]; Hays *v.* Hays, 123 S. W., 2d, 968, 969 [Tex.]; 2 Beale, Conflict of Laws, §148.1; 27 C. J. S., Divorce § 312, see Nash *v.* Nash, 236 App. Div., 89, 91). "Such right is not destroyed by the divorce, since there is in the decree no express provision to that effect, and nothing in the facts to justify it if there had been" (Eaton *v.* Eaton, supra, p. 900).

[fol. 78] That the defendant is entitled to visitation seems clear. If the petitioner, who until she left her husband was a resident of this state, intended to continue her residence here, no problem would be presented. The usual order could be entered. But petitioner has become a resident of Florida and, apparently, intends to make that state her home, while the defendant's place of business is in this state, and he must continue his residence here. Even that would present no difficulty, if the petitioner intended in good faith to abide by the order of this court. But, unfortunately, as frequently happens in cases of this nature, there is little or no assurance that petitioner will comply with the provisions of any order granting the right of visitation. Indeed, I am satisfied that, unless proper safeguards are provided, the entry of an order which merely grants the right of visitation would be a futile gesture.

Under the circumstances, the petitioner will not be permitted to remove the child from this state, unless she gives

a bond or other undertaking conditioned for the faithful performance of the terms and conditions of the order and for the return of the child to this state whenever so required. That the court has power to make such an order is clear (Campbell *v.* Lovgren, 175 Miss., 4, 166 So., 365; Gibson *v.* Gibson, 156 Ark., 30, 245 S. W., 32, 33; Mattox *v.* Mattox, 129 Okla., 301, 264 Pac. 898, 900; 2 Beale, Conflict of Laws, sec. 148.1; 27 C. J. S. 1180; see Domestic Relations Law, sec. 70; People ex rel. Paulding v. Paulding, 15 How. Pr., 167).

As to the provisions of the order respecting visitation and the terms and conditions of the bond, counsel should consult the court.

[fol. 79] In the Supreme Court of New York

Stipulation Settling Case—Sept. 29, 1945

It is Hereby Stipulated by and between the attorneys for the respective parties hereto, that the foregoing case contains all the evidence taken upon the trial and all exceptions of all parties and that an order may be entered herein settling the same as such and ordering the same on file without further notice.

Dated: New York, September 29th, 1945.

Mitchell, Capron, Marsh, Angulo & Cooney,
Attorneys for Relator-Appellant.

Isidore Cohen,
Attorney for Defendant-Respondent.

In the Supreme Court of New York

Order Settling Case—Oct. 9, 1945

On the foregoing stipulation, the above case on appeal, which contains all the evidence and exceptions of all parties, is hereby settled and ordered on file.

Dated: New York, October 9, 1945.

Felix C. Benvenga, *Justice.*

[fol. 80] IN THE SUPREME COURT OF NEW YORK

STIPULATION WAIVING CERTIFICATION—SEPT. 29, 1945

IT IS HEREBY STIPULATED by and between the attorneys for the respective parties hereto that the foregoing are true copies of the notice of appeal, of the order appealed from and of the papers on which it was entered, the case and exceptions as settled, the opinion of the Court and the whole thereof, now on file in the office of the Clerk of the County of New York, and that certification thereof is hereby waived and that an order directing the filing of the record in the Appellate Court may be entered without further notice.

Dated: New York, September 29, 1945.

MITCHELL, CAPRON, MARSH, ANGULO & COONEY,
Attorneys for Relator-Appellant.

ISIDORE COHEN,
Attorney for Defendant-Respondent.

IN THE SUPREME COURT OF NEW YORK

ORDER FILING RECORD IN APPELLATE DIVISION—OCT. 9, 1945

Pursuant to the foregoing stipulation, it is ordered that the foregoing printed record be filed in the office of the Clerk of the Appellate Division of the Supreme Court, First Judicial Department.

Dated: New York, October 9, 1945.

FELIX C. BENVENGA, *Justice.*

[fol. 81] COURT OF APPEALS OF THE STATE OF NEW YORK

[Title omitted]

SUPPLEMENTAL STATEMENT UNDER RULE 234

After the filing of the notice of appeal to the Appellate Division, an order was obtained at a Special Term of the Supreme Court, New York County, correcting and amending the title of the proceedings *nunc pro tunc* as of May 1st, 1945. A copy of said order is included in this record.

There has been no change of parties or attorneys since the appeal was argued in the Appellate Division.

[fol. 82] SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[Title omitted]

NOTICE OF APPEAL TO COURT OF APPEALS

SIRS:

PLEASE TAKE NOTICE that the relator, Rose Halvey, hereby appeals to the Court of Appeals from the order dated December 14 1945 entered upon the decision of the Appellate Division of the Supreme Court for the First Department, in the office of the Clerk of the said Appellate Division on or about the 14th day of December 1945, certified copy of which was filed in the office of the Clerk of the County of New York, on or about the 20th day of December, 1945, affirming the final order of the Special Term of the Supreme Court, New York County, entered in the office of the Clerk of the County of New York, on the 19th day of June, 1945, and the said relator appeals from each and every part of said order and from the whole thereof.

This appeal is taken as of right on the ground that there is directly involved the construction of the Constitution [fol. 83] of the United States and on the further ground that one of the Justices of the Appellate Division dissented from its decision.

Dated: New York, N. Y., January 8th, 1946.

Yours, etc.,

MITCHELL, CAPRON; MARSH, ANGULO & COONEY,
Attorneys for Rose Halvey, Relator-Appellant,
20 Exchange Place, New York 5, New York.

To:

ISIDORE COHEN, Esq.,
Attorney for John F. Halvey,
Defendant-Respondent,
150 Broadway,
New York, N. Y.

Clerk of the County of New York.

[fol.] At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 14th day of December, 1945.

Present:

HON. FRANCIS MARTIN,
Presiding Justice
" ALFRED H. TOWNLEY,
" ALBERT COHN,
" JOSEPH M. CALLAHAN,
" ISIDORE WASSERVOGEL,
Justices

15921

PEOPLE OF THE STATE OF NEW YORK, *ex rel.*, ROSE HALVEY, *Relator-Appellant*,
for a Writ of Habeas Corpus to obtain the custody of John Arthur Halvey, now held by JOHN F. HALVEY, *Respondent*

ORDER OF AFFIRMANCE BY APPELLATE DIVISION—DEC. 14, 1945

An appeal having been taken to this Court by the relator from an order of the Supreme Court, New York County, entered on the 19th day of June, 1945, except in so far as said order adjudged and decreed that the custody of the infant child John Arthur Halvey remain with the mother, and said appeal having been argued by Mr. James D. [fol. 85] Ouchterloney of counsel for the appellant, and by Mr. Jacob Shientag of counsel for the respondent; and due deliberation having been had thereon,

IT IS HEREBY ORDERED that the order so appealed from be and the same is hereby affirmed without costs. One of the Justices dissents and votes to reverse the order so far as appealed from.

Enter

F.M.

IN THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION

OPINION OF APPELLATE DIVISION

BY MARTIN, *P. J.*; TOWNLEY, COHN, CALLAHAN and WASSERVOGEL; *JJ.*

People ex rel. Halvey, rel.-ap. *v.* Halvey, res.—Though we do not adopt in their entirety the views expressed by

the Special Term, we think the result arrived at was correct. Order, so far as appealed from, affirmed, without costs. (MARTIN, *P. J.*, dissents and votes to reverse the [fol. 86] ordered so far as appealed from.) Order filed.

At a Special Term, Part II, of this Court, held in and for the County of New York, at the County Court House, at Foley Square, in the Borough of Manhattan, City, County and State of New York, on the 24 day of October, 1945.

Present:

HONORABLE FELIX C. BENVEGA, *Justice*.

IN THE MATTER of the Application of ROSE HALVEY, *Relator*, for a Writ of Habeas Corpus to obtain the custody of John Arthur Halvey, now held by JOHN F. HALVEY, *Defendant*.

ORDER OF SPECIAL TERM CORRECTING TITLE OF PROCEEDINGS—OCT. 24, 1945

Upon the stipulation hereto annexed, dated October 23, 1945, and upon all proceedings hereinbefore had, it is

ORDERED, that the title herein be corrected and amended to read as follows:

"People of the State of New York, ex rel, Rose Halvey, Relator.

for a Writ of Habeas Corpus to obtain the custody of JOHN ARTHUR HALVEY, now held by JOHN F. HALVEY, *Respondent.*"

nunc pro tunc as of May 1st, 1945, without prejudice to any proceedings hereinbefore had.

Enter,

F. C. B.
J.S.C.

[fol. 87] IN THE SUPREME COURT OF NEW YORK

STIPULATION WAIVING CERTIFICATION

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated by and between the attorneys for the respective parties hereto that the foregoing printed record upon appeal constitutes the true and correct copies of the papers on appeal to the Supreme Court, Appellate Division, First Department, from the order of the Special

Term of the Supreme Court, New York County, dated June 18th, 1945, the notice of appeal to the Court of Appeals, the order dated December 14, 1945, made by the Appellate Division, First Department, in reference to the appeal herein, the opinion of the Appellate Division and all papers upon which the Appellate Division, First Department, acted in making the said order of affirmance from which this appeal is taken and the whole thereof, now on file in the Office of the Clerk of New York County and in the office of the Clerk of the Appellate Division, First Department and certification thereof by the Clerk of the County of New York is hereby waived.

Dated: New York, N. Y., January 30th, 1946.

Mitchell, Capron, Marsh, Angulo, & Cooney,
Attorneys for Rose Halvey, Relator-Appellant.
Isidore Cohen
Attorney for John F. Halvey, Defendant-Respondent.

[fol. 88] Service of three copies of the within record on Appeal is hereby admitted this 30 day of January, 1946.

Isidore Cohen,
Atty for defendant-respondent.

[fol. 89] In the Court of Appeals of New York

State of New York, ss:

Pleas in the Court of Apeals, held at Court of Appeals Hall, in the City of Albany, on the 12th day of April in the year of our Lord one thousand nine hundred and forty-six, before the Judges of said Court.

Witness, The Hon. John T. Loughran, Chief Judge, Presiding. John Ludden, Clerk.

[fol. 90] Remittitur April 13, 1946. People &c ex rel Rose Halvey, Appellant, for a Writ of Habeas Corpus to obtain the custody of John Arthur Halvey, now held by John F. Halvey, Respondent.

Be it remembered, That on the 1st day of February in the year of our Lord one thousand nine hundred and forty-six, Rose Halvey, the appellant—in this cause, came hereunto the Court of Appeals, by Mitchell, Capron, Marsh,

Angulo & Cooney, her attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Apellate Division of the Supreme Court in and for the First Judicial Department. And John F. Halvey, the respondent—in said cause, afterwards appeared in said Court of Appeals by Isidore Cohen, his attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 91] Whereupon, The said Court of Appeals having heard this cause argued by Mr. James D. Ouchterloney of counsel for the appellant—, and by Mr. Isidore Cohen of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed without costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

[fol. 92] Therefore, it is considered that the said order be affirmed without costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office,
Albany, April 13, 1946.

I hereby certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk.

[fol. 93] At a Special Term, Part II of the Supreme Court, New York County, held at the County Courthouse, Centre and Pearl Streets, Borough of Manhattan, City and State of New York, on the 9th day of May, 1946.

Present: Hon: Hon. Aron Steuer, Justice.

People of the State of New York ex rel, Rose Halvey, Relator, for a Writ of Habeas Corpus to obtain the custody of John Arthur Halvey, now held by John F. Halvey, Respondent.

ORDER ON REMITTITUR—May 9, 1946

The above named relator having appealed to the Court of Appeals of the State of New York from the order of affirmance by the Appellate Division of the Supreme Court, First Department, dated December 14, 1945, which affirmed the order of this court entered on the 19th day of June, 1945, and from each and every part of said order of affirmance and from the whole thereof, and said appeal having been duly argued at the said Court of Appeals, and after due deliberation the Court of Appeals having ordered and adjudged that the said order so appealed from, as aforesaid, be affirmed without costs, and having ordered and adjudged that the proceedings therein be remitted to this Supreme Court there to be proceeded upon according to law;

[fol. 94] Now on reading and filing the remittitur from the said Court of Appeals herein, and upon motion of Isidore Cohen, attorney for the Respondent herein, it is hereby

Ordered that the order and judgment of the said Court of Appeals be and the same hereby are made the order and judgment of this Court.

ENTER

J. S. C.

Filed, May 10, 1946, New York County Clerk's office.

[fol. 95] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 96] IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

People of the State of New York, ex rel, Rose Halvey, Relator-Petitioner, for a Writ of Habeas Corpus to obtain the custody of John Arthur Halvey, now held by John F. Halvey, Defendant-Respondent

ORDER EXTENDING THE TIME WITHIN WHICH TO FILE AN APPLICATION FOR A WRIT OF CERTIORARI

Upon consideration of the petition of Rose Halvey, pursuant to 28 U. S. C. A., Section 350, and the Court not being in session, it is

Ordered that the time within which the petitioner may make application for a writ of certiorari be and the same hereby is enlarged and extended until August 11th, 1946.

July 8th, 1946.

Stanley Reed, Justice of the Supreme Court.

[fol. 97] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 384

ORDER ALLOWING CERTIORARI—Filed October 14, 1946

The petition herein for a writ of certiorari to the Court of Appeals of the State of New York is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.